

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 93-144
Commission's Rules to Facilitate)	RM-8117, RM-8030
Future Development of SMR Systems)	RM-8029
in the 800 MHz Frequency Band)	
)	
Implementation of Sections 3 (n))	
and 332 of the Communications Act)	GN Docket No. 93-252
)	
Regulatory Treatment of Mobile)	
Services)	
)	
Implementation of Section 309 (j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding)	

To: The Commission

REPLY TO OPPOSITION

In accordance with §1.429(g) of the Rules and Regulations of the Federal Communications Commission ("Commission" or "FCC")¹ Duke Energy ("Duke") respectfully submits this Reply to the Opposition of Nextel Communications, Inc. in the above-captioned proceeding.² Duke is concerned that should the Commission adopt the policy course recommended by Nextel rather than the various petitioners in this matter, the rights of incumbent 800 MHz licensees will be negatively

¹ 47 C.F.R. §1.429(g) (1996).

² Opposition of Nextel Communications, Inc. to Petitions for Reconsideration of the *Second Report and Order* (October 9, 1997).

impacted and Duke's critical safety-oriented dispatch telecommunication operations could be compromised. Thus, Duke is pleased to have this opportunity to respond to Nextel's opposition.

I. INTRODUCTION AND BACKGROUND STATEMENT

1. Duke is a major public utility which is certificated by the states of North Carolina and South Carolina to provide electric power throughout the piedmont and western sections of the Carolinas. Duke is one of the nation's largest public utility companies and is responsible for providing electric power to approximately 1.8 million customers throughout its 22,000 mile service area. Duke's power network includes numerous generating stations and substations as well as nuclear power plant facilities.

2. Management and operation of Duke's geographically diverse service area encompasses many functions for which reliable and dedicated private telecommunications support is required. These functions include: routine maintenance of the Duke power system, answering service calls, service installations, and the handling of emergency situations which may be caused by accidents or natural disasters. In order to meet its need for a highly reliable internal telecommunications system, Duke has constructed a wide-area 800 MHz private land mobile radio system. The system is quite complex and encompasses over 41 base and/or mobile relay sites, 4300 mobile radios, 850 portable radios, 255 control stations, and 3 main dispatch console systems. In the aggregate, the Duke system is licensed for operation on 63 channel pairs of which approximately half are located in the "upper 200" SMR channels. As Duke potentially faces disruption of its telecommunication activities because of the migration of its system and to accommodate transition to wide-area EA licensing in the 800 MHz spectrum, Duke is quite

concerned about the instant proceeding and is pleased to have this opportunity to provide its Reply to the Commission.

3. The *Second Report and Order* ("*Second R & O*") established, among other things, the rights and obligations of incumbent SMR licensees and new Economic Area ("EA") licensees who will hold wide area 800 MHz licenses after the completion of the EA licensing auctions. Further, the *Second R & O* established rules for retuning incumbent SMR operators out of the upper 200 SMR channels and established a policy applicable to the assumption of retuning costs and reimbursement of those costs by EA licensees. Several petitioners have sought reconsideration of the policies adopted in the *Second R & O*.³ These petitions represent commentary predominantly by incumbent 800 MHz licensees or their representative associations. Duke believes that these petitions are quite beneficial in helping the Commission to finalize its rules in a manner which will, at least to some extent, minimize transition difficulties faced by incumbent 800 MHz licensees. Thus, as is further discussed herein, Duke is in general agreement with much of the commentary filed by the various petitioners. Duke believes that Nextel's Opposition proposes policies which will be harmful to the interests of incumbent licensees including Duke. Thus, should the Commission act in accord with Nextel's policy proposals, vital public safety-oriented telecommunications services would be harmed. Such a scenario certainly

³ The petitioners include: the American Mobile Telecommunications Association ("AMTA"); the Personal Communications Industry Association ("PCIA"); Small Business in Telecommunications ("SBT"); Entergy Services, Inc. and Delmarva Power ("Entergy/Delmarva"); the Industrial Telecommunication Association, Inc. ("ITA"); the Automobile Club of Southern California ("Auto Club"); and Genesee Business Radio Systems, Inc. ("Genesee").

is not in the public interest and Duke believes that the Commission should act in accordance with the positions of the petitioners and adopt their policy recommendations.

II. REPLY COMMENTS

4. Nextel proposes that the Commission take steps to limit the capabilities of incumbent systems to be modified following termination of the EA auction process, and to minimize the duty of EA licensees to reimburse incumbents for the cost of migration. Additionally, Nextel urges the Commission to minimize the responsibilities of EA licensees to provide adequate notification to incumbent licensees during the migration process, and Nextel suggests that a shorter retuning negotiation time frame should be established. Duke opposes adoption of these proposals as outlined below.

A. The Commission Must Ensure That The Incumbent 800 MHz Licensees Retain The Flexibility to Ensure Efficient Operation Of Their Systems

5. The Commission's *Second R & O* provides incumbent SMR businesses conducting operations on the "lower 80" SMR and General Category channels to have some operational flexibility by permitting system modifications within the incumbent's 18 dBu signal strength contour where the incumbent licensee "obtains the consent of all affected parties".⁴ ITA proposes that the Commission should adopt a policy wherein a frequency coordinator's authorization could be substituted in lieu of the consent of all affected licensees where such consent is not obtainable.⁵ Nextel argues that obtaining the consent of all affected co-channel licensees is necessary to protect against harmful interference.

⁴ ITA Petition at page 3.

⁵ Petition of ITA at page 4.

6. Duke is in agreement with ITA's proposal and believes Nextel's policy suggestion is misplaced. Where a certified frequency coordinator can perform an engineering study, and where the incumbent licensee proposes a modification of its system that will not expand its 18 dBu contour, there is no valid technical reason to require that a potentially affected co-channel licensees' consent must be obtained for the modification. For some time the Commission has successfully used contour protection standards to ensure flexibility for licensees as well as efficient use of the limited spectrum resource. Generally, the system has worked well. Thus, Nextel's objection appears unfounded. Accordingly, Duke supports ITA's proposal and believes that it should be promptly adopted by the Commission. Additionally, Duke supports ITA's proposal to minimize the threat of challenges to incumbent system modifications.⁶ While Nextel believes that ITA's proposal would "expand the rights of the incumbent by mandating greater co-channel protection from an EA licensee than an incumbent is entitled to"⁷ incumbent licensees must have an adequate means to modify systems and maintain those modifications where interference to other licensees may be adequately managed. Moreover, prior to auctions, potential 800 MHz spectrum bidders may easily take advantage of review of FCC records and databases to fully apprise themselves of the coverage of preexisting systems and prepare business plans and bidding strategy in accordance with their findings. Thus, adoption of ITA's proposal poses no real threat of harm to EA licensees.

⁶ Petition of ITA at page 4.

⁷ Nextel Opposition pages 4-5.

**B. The Commission Must Adopt Policies That Will Ensure A Reasonably
Smooth Transition To Wide Area Licensing**

7. The *Second R & O* also establishes the rules which will govern the retuning of incumbent licensees out of the "upper 200" SMR channels. The Commission has adopted a five year cap on the responsibility of EA licensees to reimburse recurring expenses which are triggered by migration of incumbent systems. Genesee Radio Systems suggests that a longer term should be adopted.⁸

8. Nextel opposes Genesee's position and supports a three year limitation on repayment of recurring expenses. In defense of its position, Nextel notes that any payments by EAs of recurring expenses beyond a three year period would be "purely speculative" and beyond the realm of the Commission's cost reimbursement parameters.⁹ Duke opposes Nextel's position and supports Genesee's contention that EA licensees should be required to reimburse migrating incumbents for any new recurring expenses for at least a ten year period. It is unfair to ask incumbents who agree to migrate for the benefit of an EA licensee to assume new costs such as added site fees which they incur to accommodate the EA licensee. As was explained by Genesee in its Petition for Reconsideration,¹⁰ most communication systems are put into service by operators with the expectation of a ten year or even greater life cycle. Thus, it is only equitable that when an EA licensee demands and benefits from the migration of an incumbent licensee, the EA

⁸ Genesee Petition at page 4.

⁹ Opposition of Nextel at page 8.

¹⁰ Petition of Genesee at page 4.

licensee should assume new recurring expenses which exceed existing recurring expenses for a ten year period.

9. Duke also is concerned that the Commission adopt notice requirements in conjunction with the migration of incumbents which will be adequate to smooth the transition process for all parties. In that connection, PCIA requested that the Commission adopt more specific rules concerning the retuning notice provided by the EA licensee intending to relocate an incumbent. Nextel opposes PCIA's request.¹¹ While PCIA's notice proposal goes beyond that initially adopted by the Commission, Duke believes the proposal is quite reasonable. Rather than sending a "general notice" to an incumbent licensee that its system may need to be retuned, the EA licensee should, as PCIA suggests, provide all specific details that are available to the incumbent licensee in terms of sites, frequencies, and other technical parameters of its relocation demands as early as possible. This will expedite the retuning process by providing adequate information to incumbents at an early date. Additionally, Duke does not agree with Nextel's position that the two year time period for mandatory incumbent system relocations is too lengthy and should be shortened.¹² While the earlier 2 GHz microwave migration to accommodate PCS may provide a good general model for spectrum migrations in other services, the retuning of fixed links to lightly encumbered alternate spectrum was considerably easier than will be the case with the reengineering of 800 MHz mobile systems into crowded replacement spectrum. Thus, Duke believes that this migration will be considerably more time consuming than the 2 GHz microwave

¹¹ Opposition of Nextel at page 8.

¹² Opposition of Nextel at page 9.

transition proved to be, and believes that the current 2 year period is the absolute minimum time that would be necessary to ensure a reasonable transaction and to minimize disruption of vital services to the public. Accordingly, Duke opposes Nextel's suggestion that the two years retuning negotiation time period should be reduced.

III. CONCLUSION

10. Duke is concerned that the Commission establish policies and procedures which will help minimize disruption of service during the 800 MHz spectrum migration process. The migration will not be easily accomplished and many technical hurdles will have to be overcome for this transition to take place. Duke reminds the Commission that its actions in this instance will determine the fate of numerous incumbent licensees and that many of these licensees have public safety-oriented responsibilities. Duke also reminds the Commission of the directives of Congress that the Commission should engage in spectrum management in a manner which will help protect and ensure the viability of safety-oriented private internal system operations.¹³ By acting in accordance with the suggestions contained herein, Duke believes that the Commission may take steps that will certainly not eliminate the serious burdens that the transition will impose upon incumbent licensees but which will at least help minimize the substantial burdens that incumbents will face. In this manner, the Commission can act to help maintain the viability of critical private radio systems.

¹³ *Balanced Budget Act of 1997*; P.L. No. 105-33; § 3002 (a)(2)(A)(i)(ii)(1997).

WHEREFORE, THE PREMISES CONSIDERED, Duke opposes the positions expressed by Nextel to the extent described above and respectfully requests that the Commission act in accordance with Duke's comments to ensure that reasonable treatment of incumbent licensees will be maintained throughout the 800 MHz transition process.

Respectfully submitted,

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October 20, 1997

CERTIFICATE OF SERVICE

I, Tracy Lynn Trynock, hereby certify that on this 20th day of October, 1997, copies of the foregoing "Reply To Opposition" have been served by hand-delivery or by first-class United States Mail, postage prepaid, upon the following:

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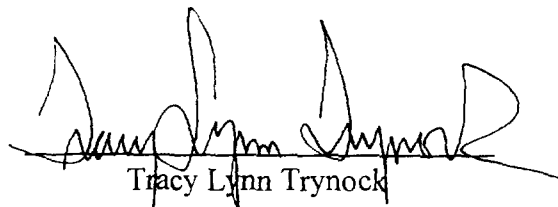
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